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IN THE

# SUPREME COURT OF THE UNITED STATES

JULIETTA LEZA,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# PETITION FOR A WRIT OF CERTIORARI

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May 26, 2005

## QUESTIONS PRESENTED

1. When no legitimate basis for an objection exists at the time of trial to events subsequently determined to be constitutional error, does traditional "plain error" analysis nevertheless apply notwithstanding that the failure to object is not attributable to the defendant?

2. Must a defendant sentenced without constitutional objection under mandatory Sentencing Guidelines, subsequently held unconstitutional in *Booker*, demonstrate a reasonable probability from the record alone that her sentence would have been significantly different under advisory guidelines in order to be entitled to relief?

3. If not, what is the proper burden for a defendant to establish plain error in such circumstances, and in the interests of fairness and judicial economy, is such burden satisfied by demonstrating a *reasonable possibility* that the outcome would have been significantly different?

## PARTIES TO THE PROCEEDINGS

The parties to the proceeding below are contained in the caption of the case.

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## INTRODUCTION

In *United States v. Booker*, 125 S. Ct. 738 (2005), this Court held that when a sentencing judge, bound by mandatory United States Sentencing Guidelines, increases the sentencing range under the Guidelines based on facts not found by the jury or admitted by the defendant, the sentence violates a defendant's Sixth Amendment right to a jury trial. The Court noted that its decision applied to all cases on direct review, noting that "prudential doctrines" such as the "plain error" test would apply. *Id.* at 769. The Circuits have since become a trifecta of vastly differing opinions as to how the plain-error test should be applied to cases on direct appeal. The First, Fifth, Eighth, Tenth, and Eleventh Circuits have applied the highest burden for defendants to meet, requiring an actual, specific showing of harm due to being sentenced under mandatory guidelines.[1] Under this burden, unless a defendant was fortunate enough to have a verbose and pontificating sentencing judge who happened to note that he would have imposed a significantly lighter sentence if he were not bound by the Guidelines, reversible plain error cannot be established. The Third, Fourth, Sixth, and Ninth Circuits, on the other hand, remand for re-sentencing nearly all such cases with a presumption of prejudice when a defendant's sentence was imposed under

[1] The First Circuit in one instance has lessened the required showing from a probability to a reasonable possibility. See *United States v. Heldeman*, 402 F.3d 220 (1st Cir. 2005) and Petitioner's discussion of that approach at pp. 16-22, *supra*.

mandatory Guidelines. The Second, Seventh, and District of Columbia Circuits have resorted to a middle-ground—a partial remand to ask the sentencing judge if he or she would have imposed a significantly different sentence under advisory Guidelines. These three circuits, in effect, ask the district court whether the third prong of the plain-error test is satisfied.

This circuit split, which has adopted the meme of a "three ring circus" by a multitude of commentators and at least one Circuit Judge,[2] affects an enormous number of cases and concerns an issue of paramount importance due to the substantial rights implicated. In *Booker* this Court affirmed that the stated goal of the Guidelines is to create "a system that diminishes sentencing disparity." *Booker* at 759. Unfortunately, the present conflict between the Circuits greatly frustrates this purpose, causing one Circuit Judge to opine that "This wide ranging circuit split results in the disparate treatment of criminal defendants throughout the nation. Such uneven administration of justice cries out for a uniform declaration of policy by the Supreme Court."[3] Furthermore, Petitioner submits that the facts and issues presented in her case squarely and simply present an excellent vehicle for this Court to review the conflict between the

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[2] *United States v. Pirani*, ___ F.3d ___, 2005 WL 1039976 (8th Cir. April 29, 2005), *on panel reh'g.* (Bye, J., dissenting).

[3] *United States v. Gonzales-Huerta*, 403 F.3d 727 (10th Cir. April 8, 2005) (Lucero, J., dissenting).

various circuits. Accordingly, this Court's review is greatly warranted.

## OPINIONS BELOW

The court of appeals denied both Petitioner's appeal (No. 03-41527) in an unpublished opinion on December 22, 2004, available at 2004 WL 2980353, and her subsequent petition for panel rehearing (in light of *Booker*) without opinion on February 28, 2005.

## JURISDICTION

The Fifth Circuit Court of Appeals entered judgment denying Petitioner's motion for a panel rehearing on February 28, 2005. This Petition is timely filed within 90 days of that decision. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves:

U.S. CONST. amend. VI;
FED. R. CRIM. PROC. 52; and
18 U.S.C. § 3553(a).

## STATEMENT OF THE CASE

### A. The district court proceedings

On August 5, 2003, in Cause Number 03-CR-52-3, Petitioner Julietta Leza was convicted by a jury in the Southern District of Texas for conspiring to knowingly and intentionally possess with intent to distribute five (5) kilograms or more of cocaine in violation of 18 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. Petitioner was acquitted on two other count of possession with intent to distribute 164 kilograms and 65 kilograms, respectively.

At sentencing on October 23, 2003, the quantity of illegal controlled substances for which Petitioner was responsible for purposes of calculating her sentence under the then-mandatory United States Sentencing Guidelines was in dispute.[4] At the hearing, the trial judge found by a preponderance of the evidence that the amount of cocaine attributable to Leza exceeded 150 kilograms, over thirty times the quantity determined by the jury beyond a reasonable doubt. Leza made no Sixth Amendment objection. Based on its finding, the court imposed sentence upon Petitioner based on that quantity as mandated by the Sentencing Guidelines.

It is clear throughout the sentencing proceeding that the district court, the Government, and Petitioner

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[4] Petitioner admitted that she was responsible for 48 kilograms, but no more.

believed themselves bound by the Sentencing Guidelines. The Government itself recommended the Safety Valve and the "bottom" sentence for Petitioner.

It is equally clear from the transcript of the sentencing hearing that, because of the mandatory nature of the Sentencing Guidelines, the trial court failed to consider any of the other factors enumerated in 18 U.S.C. §3553(a) other than the mandated sentence range. The trial court sentenced Petitioner to 188 months imprisonment, the *minimum* under the Guideline range of 188 to 235 months.

Had Petitioner been sentenced for the minimum of five kilograms of cocaine charged in the indictment and found by the jury, without the safety valve, her maximum sentence under the Guidelines would have been 121 months with the safety valve and 151 months without. Had Petitioner been sentenced based on the 48 kilograms admitted by her after the trial but before sentencing, her maximum sentence would have been 151 months with the safety valve and 168 months without. Instead, based on facts found by the judge at sentencing who was then compelled to apply the sentencing table, Leza received a sentence of 188 months. This sentence significantly exceeds the maximum sentence that could have been imposed solely on the basis of the facts reflected in the jury verdict and admitted by Petitioner. Her sentence plainly violates the Sixth Amendment. *United States v. Booker*, 543 U.S. _____ (2005); *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004).

### B. The court of appeals' decision

On December 22, 2004, in a brief, unpublished opinion, the Fifth Circuit denied Petitioner's appeal based on, *inter alia*, its subsequently overruled decision in *United States v. Pineiro*, 377 F.3d 464, 465 (5th Cir. 2004) (holding United States Sentencing Guidelines constitutional notwithstanding this Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004))., *cert. granted, judgment vacated by Pineiro v. U.S.*, 125 S. Ct. 1003 (Jan. 12, 2005). Pet. App. A-1.

In an unopposed motion, Petitioner requested leave to file a supplemental petition for panel rehearing in light of this Court's decision in *Booker*. Petitioner's request was granted January 20, 2005, and the issue of plain error was thoroughly briefed by both sides.

On February 28, 2005, the Fifth Circuit denied Petitioner's request for panel rehearing without opinion. Pet. App. A-4.

## REASONS FOR GRANTING THE PETITION

### 1. The Philosophical Notion of Justice

Our system is founded on a basic notion of justice. That notion, amorphous in specifics, is easily recognizable in application. The historical guide to that application is an underlying framework of fairness.

The Founding Fathers' self-evident truths imply the existence of a corollary set of self-evident falsehoods. From these falsehoods spring fundamental wrongs; wrongs of such a nature that, if allowed to remain uncorrected, would eviscerate the self-evident truths. The correction of these fundamental wrongs, no matter how belated, is inherent in the structure of our appellate process and overall concept of justice. The plain error doctrine is at the very foundation of that structure.

When error is committed at trial and the defendant objects, the test on review is whether the error is harmless. Only when it is clear that the error did not affect the proceeding does the result stand in spite of the error. The test is predicated on fairness. The defendant has brought the matter to the attention of the trial court. He or she has done all things possible under the circumstances; yet in spite of the best of efforts, the error nevertheless remained.

When error is committed at trial and the defendant *does not* object, however, the defendant forfeits the error by his failure to place the trial court on notice of the error and allow that court an opportunity to correct its mistake. Fairness dictates that when a defendant idly stands by and knowingly or negligently allows an error to be committed, the defendant should not thereafter be allowed to undo the result. "The Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S. 637, 681 (1986). The defendant must bear some responsibility to place the court on notice of perceived errors in that trial.

Yet there are some circumstances when unobjected error is of such great significance that our notion of justice demands correction. An innocent man convicted as a result of his lawyer's procedural neglect is one such instance. In these situations, fundamental justice dictates that the result be overturned.

This Court spoke of such "fundamental justice" in *United States v. Olano*, 502 U.S. 725, 732 (1993). Not every unnoticed error demands correction under the plain error doctrine. It is only fundamental error of extreme significance; errors that affect rights asserted "which are of such high character as to find expression and sanction in the Constitution or Bill of Rights." *Weems v. United States*, 217 U.S. 349, 362, 30 S. Ct. 544, 547 (1910). The error must be "particularly egregious" that, without correction, would result in a "miscarriage of justice." *United States v. Young*, 470 U.S.1, 15, 105 S. Ct. 1038, 1046 (1985) *quoting United States v. Frady*, 456 U.S. 152, 163, n.14, 102 S. Ct. 1584, 1592, n.14 (1982). This type of error when not the subject of an objection at trial is governed by the plain error doctrine.

In order to establish plain error, a defendant must show that there was error, the error was plain, the error affected substantial rights and the error seriously affected the fairness of the proceeding. *United States v. Olano*, 502 U.S. 725 (1993). Unlike harmless error, the test for plain error places the onus on the defendant for it is he who forfeited the error in the first place.

Not only must the error committed have

significance, the impact of the error must be significant as well. An error, otherwise of great import, that does not affect a substantial right of the accused is an error of little or no substance. Where there is nothing egregious to correct and no miscarriage to be righted, the error becomes a matter of form for which no substance may be assigned. Nothing can be said to offend the notion of justice. The error is not prejudicial to the defendant.

When a significant error affects the outcome of the proceeding the notion of justice is challenged. The innocent person convicted solely as a result of a procedural omission offends our sense of fundamental justice -- such a conviction should not stand. It is not this scenario that gives one pause, but rather those cases where the effect of a significant error on the proceeding is not abundantly clear.

When does an error, not objected to at trial, affect substantial rights and what must a defendant show to demonstrate such an effect? In the context of *Booker*, it is this question that has split the Circuit Courts.

## 2. The *Booker* Conundrum

The substantial right in *Booker* cases is the right to trial by jury; the right of an accused to have a jury determine whether the accused has committed a crime as that crime is defined by statute. This Court held that a Defendant sentenced under mandatory guidelines based on facts not admitted or determined by a jury violates the Sixth Amendment. *Booker* at

756-57. This is a fundamental error of extreme significance. When the "law at the time was settled and clearly contrary to the law at the time of the appeal," the error is plain. *Johnson v. United States*, 520 U.S. 461, 468 (1997). The Circuits are in agreement that *Booker* error is plain error. Where they diverge is in the determination of the effect of that error.

This Court has examined the traditional burden placed on a defendant under a plain error analysis. Noting that the underlying purpose of Federal Rule of Criminal Procedure 52 is to encourage timely objections at trial, this Court has stated that the burden to demonstrate that the outcome would have been affected "should not be too easy." *United States v. Dominguez Benitez*, 542 U.S. 74 (2004). But *Booker* cases are inherently different; a timely objection at trial was foreclosed because the law was then well established and such objection would have been frivolous. The underlying purpose of Rule 52 never came into play. The innocent man convicted has been convicted as a result of a procedural error that was not recognized as such by anyone at the time the error was committed. There was no opportunity to object because there was no foresight that an objection was permissible or warranted under then existing law.

This is the *conundrum*; it is the basis for the dissension between the Circuits and the reason for granting certiorari in this case.

The Circuits have split in an effort to achieve the right result within the confines of existing plain error

rationale. The conundrum exists because plain error places the burden on the back of the defendant to demonstrate that the proceeding was affected by the error committed. The rationale behind the shift in the burden is that the defendant had an opportunity at trial to challenge the error but failed to do so. The defendant forfeited the error and now seeks belatedly to remedy his mistake. He should be punished but not too severely; if he can demonstrate that the error was significant and the error prejudiced him, our notion of justice provides him a second chance.

Cases like *Booker* do not fit within this second chance rationale for plain error correction; application of the doctrine is not a second opportunity because the first opportunity never existed in any real or practical sense. While the remaining *Booker* cases "in the pipeline" will slowly play out, the underlying conundrum will remain. It is simply a matter of time before the next *Booker*-type error will arise.

### 3. The Circuits' Attempts at Finding a Solution

The Circuits' attempts to resolve the *Booker* conundrum have resulted in three well-reasoned but divergent approaches yielding three conflicting resolutions.

The first approach, adopted by the Third, Fourth, Sixth, and Ninth Circuits looks solely at the result of the error and disconnects the error to be remedied from the decision of whether there is to be a remand. If "the district court could have imposed the sentence

it did without exceeding the relevant Sixth Amendment limitation," there is no affect on the outcome. If, however, the sentence exceeded the limitation, the outcome was affected and "the defendant has made the required showing." *United States v. Davis*, ___ F.3d ___, 2005 WL 976941 (3d Cir. April 28, 2005); *United States v. Hughes*, 401 F.3d 540, 551 (4th Cir. 2005); *United States v. Milan*, 398 F.3d 445 (6th Cir. 2005); *United States v. Ameline*, 400 F.3d 646 (9th Cir. 2005), *reh'g en banc granted* by 401 F.3d 1007 (9th Cir. March 11, 2005).

This approach effectively presumes that because the error occurred, the outcome was affected in some fashion. That presumption ultimately arises because the reviewing court can do no more than speculate as to the effect of the error. The Fourth Circuit draws much of its support from language in *Kotteakos v. United States*, 328 U.S. 750 (1946). But *Kotteakos* is ultimately a harmless error case; the burden was not on the defendant. The reliance on *Kotteakos* is derived from the discussion in *Dominguez Benitez* concerning the similarities in the *Kotteakos* standard to the elements of "reasonable probability." But *Dominguez Benitez* does not posit that speculation of what might have been equates to a reasonable probability that the outcome would have been affected.

While this approach ensures that all defendants facing a constitutional error receive an opportunity to correct that error, it does so by simply positing that a different result would have probably occurred and forecloses any inquiry into whether such a result has any practical chance.

The second approach, adopted by the First, Fifth, Eighth, Tenth, and Eleventh Circuits turns on whether the defendant has demonstrated "a reasonable probability that he would have received a more favorable sentence with the *Booker* error eliminated by making the Guidelines advisory." *United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. 2005)[5]; *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005); *United States v. Pirani*, ___ F.3d ___, 2005 WL 1039976 (8th Cir. April 29, 2005), *on panel reh'g.*; *United States v. Gonzalez-Huerta*, 403 F.3d 727 (10th Cir. 2005); *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005), reh'g en banc denied, ___ F.3d ____, 2005 WL 895174 (11th Cir. 2005), *cert. filed.*

This approach relies heavily on the language of *Dominguez Benitez*. It properly shifts the burden to the defendant under the constraints of Rule 52 and traditional harmless error analysis. The defendant must somehow demonstrate a reasonable probability exists that the outcome was affected by the error committed. There must be some word or deed in the record that places the reviewing court on notice that were the matter remanded the sentencing court would have done something differently. The initial problem with this approach is the quantum of evidence that meets such a burden. It is wholly reliant on the luck of the defendant's draw of sentencing judges and whether that judge, at that moment, sought to speak his mind. If the sentencing judge is verbose at the requisite hour, the necessary quantum may be met.

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[5] See fn. 1, *infra*.

On the other hand if he or she is behind schedule, regardless of their views on the matter at hand, they may elect not to express those views as a matter of expediency.

The quantum of evidence problem is ultimately rooted in the conundrum itself. Because there was no reason to anticipate that a procedural event would subsequently become accepted constitutional error, there was no reason at the time to ensure that such facts would be present in the record to enable a reviewing court to conclude that a reasonable probability of a different result existed. A precious few fortuitous defendants will meet the evidentiary burden of reasonable probability simply by sheer good fortune. Most will not. Such an approach offends our traditional notions of justice because the determination to correct the error is made by random lot.

The third approach, pragmatically adopted by the Second, Seventh, and District of Columbia Circuits inquires of the sentencing court whether in each case it would have sentenced differently had it known that the guidelines were merely advisory. *United States v. Crosby*, 397 F.3d 103, 120 (2d Cir. 2005); *United States v. Paladino*, 401 F.3d 471, 483 (7th Cir. 2005); *United States v. Coles*, 404 F.3d 746 (D.C. Cir. 2005).

This final approach seeks to stay within the confines of Rule 52 by requiring some evidence that the error affected the outcome. But that evidence may (if not must) come from outside the record, because the record cannot reflect what might have happened

at sentencing had the error not been present. There is a certain practical common sense inherent in this approach, and while it solves the short-term *Booker* problem quite conveniently, it does not necessarily solve the *Booker* conundrum unless such an approach is adopted in every situation the conundrum is confronted.

Such an inquiry is logistically problematic, however, and those logistics in the modern federal world may ultimately defeat the underlying purpose of the solution. By the time the error is recognized the case is often long from the trial court. Trial judges retire, pass away, or simply forget important aspects of the case that is now the subject of the inquiry. They must review the file and their notes and hope that they can recall their distant impressions in order to adequately and correctly respond to the inquiry. If they fail, a defendant who may otherwise be entitled relief is now left without remedy. Our notion of justice is again offended. Finally, the deleterious effect on judicial efficiency of such an approach begs a better solution.

None of the varied Circuits' resolutions to the *Booker* conundrum wholly solves the underlying problem: the failure to object at trial was not a mistake that the defendant failed to prevent. Such mistakes do not neatly conform to the judicial philosophy underlying conventional plain error. In *Olano*, this Court described three separate plain error applications, each of which varied as to the third element. The first involved structural errors, errors of such significance that the entire process was called

into question--errors for which there is no necessity to determine if the outcome was affected. Second are those errors that by their nature it is presumed that the outcome must have been affected. And third, those errors, otherwise forfeited at trial, but which notions of justice allow a remedy when the defendant can demonstrate the probability of prejudice. *United States v. Olano*, 507 U.S. 725 (1993).

Under *Olano*, the type of error determines the level of burden, if any, that must be met by a defendant to establish the third prong of plain error. While there is little gap in the contrasting onus between the first two types of error, there exists a wide chasm between the latter two. Faced with a *Booker*-type conundrum, the presumption model nearly always dictates remand; conversely the probability of prejudice model will usually dictate little or no relief at all.

Our notion of justice and fair play is particularly offended when a frivolous defendant, imposing an objection contrary to well-established law, receives the benefit of having a subsequently determined error decided in his favor while the diligent, respectful defendant must bear the burden of proving the impossible in order to secure similar relief.[6] Yet this

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[6] Judicial efficiency is not served by a policy that requires a prudent defendant to spend several hours during each trial offering up a litany of presumably frivolous objections, all clearly and concededly foreclosed by caselaw. Such objections, for example, might include: all felon-in-possession laws violate the Second Amendment, the death

is exactly what occurs when the traditional plain error doctrine is applied in *Booker*-type cases. The respectful defendant cannot meet the probability of prejudice model except by happenstance or luck of the draw.

Petitioner submits that perhaps it is not merely the type of error that should dictate the method of plain error review but rather the underlying basis for how that error arose that should be the subject of scrutiny as well.

**4. Petitioner's Case is an Ideal Vehicle for Resolution**

The facts of Petitioner's case make it an appropriate vehicle for resolving the *Booker*

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penalty violates the Eighth Amendment, all possessory Controlled Substance laws exceed the limits of Congressional power under the Commerce Clause (notwithstanding this Court's forthcoming decision in *Ashcroft v. Raich*, 352 F.3d 1222 (9th Cir. 2003), *cert. granted,* 124 S. Ct. 2909 (2004)), the gold fringes around the American flag in United States District Courts divest those courts of all but admiralty jurisdiction, that the income tax is unconstitutional for a myriad of reasons, that the AEDPA's one-year statute of limitation violates the Suspension Clause, followed by several hours, *sub judice,* of similar objections. If the onus is on the defendant to object to every conceivable error at bar, no matter how thoroughly foreclosed by long-standing precedent, jurisprudentially unsound, or latently frivolous, a multi-hour desultory filibuster of such objections is more prudent than trying to satisfy an insurmountable burden on plain error review.

conundrum. Petitioner was convicted of conspiracy to possess five kilograms or more of cocaine. She was acquitted on two separate counts involving possession of cocaine with intent to distribute 164 kilograms and 65 kilograms, respectively. Her sentence was based, in part, on facts admitted by Petitioner as to 48 kilograms and facts found by the trial court for the remaining amounts. Her sentence was neither enhanced nor reduced by other factors. She received the lowest possible sentence within the guideline range determined by the sentencing judge. At sentencing, the court acknowledged that it was bound by the guidelines but did not express any other sentiment concerning the sentence or the Guidelines themselves. Her case is straightforward without complicating issues. In short, it is "run of the mill." Petitioner would suggest that such a case is ideal for resolving the conundrum due to its very simplicity.

Petitioner cannot demonstrate unequivocally that the sentencing court would have sentenced her differently had the guidelines been advisory. What Petitioner can demonstrate are certain *indicia* that the sentencing court, faced with the same situation today under an advisory system, might have selected a different course, a course less prejudicial to Petitioner.

Curiously, the sentencing court entertained information about the Petitioner's family and the future welfare of her four children. In the mandatory guideline scheme such information was not relevant to a determination of Petitioner's sentence. Unless it is assumed that the sentencing court was simply passing

the time of day, there must have been some relevance to the information. Petitioner submits that such considerations are indicia that the sentencing court, had it been allowed to consider such factors, may have included those factors in its sentence determination.

The evidence at trial was that Petitioner and the conspiracy leader were romantically involved at all times that Petitioner was involved in the conspiracy. At sentencing, the court inquired into the origins and duration of that romantic relationship. Like the family inquiry, this information was not relevant to a determination of Petitioner's sentence under the mandatory guidelines though it was relevant to the length of time Petitioner was involved in the conspiracy. Again, the inquiry is indicia that the sentencing court, had it been allowed to consider such factors, may have included those factors in its sentence determination.

Finally, the court sentenced Petitioner at the very bottom of the mandatory guidelines for the quantity the court determined appropriate under the guidelines, in this instance 188 months. The mandatory guidelines consist of a series of arbitrary ranges of months of imprisonment, ranges that follow no normal human practice or division such as years or quarters of years. Petitioner's sentence of fifteen years and eight months is a rather odd number anywhere but within the mandatory guideline scheme. Petitioner submits that the sentencing court's statement, in the middle of the sentencing hearing, that the court would not impose a sentence above the 188 month minimum is further indicia that had the

sentencing court, faced with the same situation today under an advisory system, might have selected a different course—a course less prejudicial to Petitioner.

### 5. Indicia as Predictors

What galls the soul about the reasonable probability of prejudice model in *Booker*-type cases is the model's inherent unreliability in these situations. Not only must there exist some indication that matters might (or would) have been different, but those indications must rise to the level of a "reasonable" probability, something less than a preponderance of the evidence, but something more than an strong possibility. *United States v. Dominguez Benitez*, 124 S. Ct. at 2339-40. In summarizing the various standards of probability, Justice Scalia in his concurring opinion in *Dominguez Benitez* fairly summarizes the difficulty of making such an assessment:

> Such ineffable gradations of probability seem to me quite beyond the ability of the judicial mind (or any mind) to grasp, and thus harmful rather than helpful to the consistency and rationality of judicial decision-making. That is especially so when they are applied to the hypothesizing of events that never in fact occurred. Such an enterprise is not fact-finding, but closer to divination. *United States*

> *v. Dominguez-Benitez*, 124 S. Ct. at 2342, (Scalia, J., *concurring*).

Justice Scalia's solution in *Dominguez Benitez* was to adopt a more likely than not standard for plain error "where a defendant has failed to object at trial, and thus has the burden of proving that a mistake *he failed to prevent* had an effect on his substantial rights...." *United States v. Dominguez Benitez*, 124 S. Ct. at 2342, (Scalia, J., *concurring*) (emphasis added). That solution unfortunately does not resolve the *Booker* conundrum because the solution assumes that the defendant knowingly or negligently failed to prevent the error in question and should now suffer an additional burden for such failure.

Petitioner submits that in *Booker*-type plain error cases, the underlying principles of plain error are satisfied if some indicia can be adduced that *reasonably* indicate that matters could (as opposed to would) have been different had the error not occurred. Rare will be the case where no indicia are present to guide the reviewing court as to such reasonable possibility.

This reasonable possibility approach has been adopted, to an extent, by the First Circuit in its opinion in *United States v. Heldeman*, 402 F.3d 220, 224 (1st Cir. 2005):

> Even where plain error is required, we have recognized that a district judge may well not have expressed his or her reservations because the guidelines made them hopeless * * *

> we are inclined not to be overly demanding as to proof of probability where, either in the existing record or by plausible proffer, *there is reasonable indication* that the district judge might well have reached a different result under advisory guidelines. *United States v. Heldeman*, 402 F.3d at 224 (emphasis added).

By easing the plain error standard placed on *Booker*-type defendants, both those in the pipeline now as well as those that will come in the future, the conundrum disappears. In those instances where no indicia can be found that matters might reasonably have been different but for the error, our notion of justice is not offended. The indicia required takes the review to a level above a harmless error analysis but somewhat below the reasonable probability model. The reviewing court is not asked whether, but for the error, is there any assurance that the error did not affect the outcome. Nor must the reviewing court struggle with whether the record demonstrates that but for the error there is a reasonable probability that the result would have been different. Rather the review would be limited to whether some indicia in the record exists that would lead a reviewing court to reasonably believe that the outcome could have been affected. It is an analysis based on *reasonable possibility*.

## CONCLUSION

Our notion of justice and fair play is ultimately grounded in reasonableness. *Dominguez Benitez* recognizes this reasonableness as the touchstone: is the probability of a different result "sufficient to undermine confidence in the outcome?" Where it is difficult, if not impossible to make such a determination and the fault does not lie with the defendant (or anyone else for that matter), is it not reasonable to ask if there is some indication in the record, some indicia, that the outcome could have been affected? Both fairness and judicial efficiency imply the appropriateness of an affirmative response to that query.

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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